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NO. 04-1491

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MAINE,

Petitioner,

vs.

JOSHUA PATTERSON,

Respondent.

On Petition For A Writ of Certiorari To
The Maine Supreme Judicial Court Sitting As
The Law Court

BRIEF OF COLORADO, ARIZONA, DISTRICT OF COLUMBIA, HAWAII, OKLAHOMA, UTAH, AND VERMONT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

PAGE

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE AND FACTS 2

REASONS FOR GRANTING THE WRIT 4

I. There Is A Need For Guidance In The Area Of When A Seizure Occurs In The Context Of Street Encounters, Particularly In Light Of The Maine Law Court's Decision, Which Is In Direct Conflict With Decisions Of Other States And Circuits, And This Court's Own Decisions 5

CONCLUSION 14

TABLE OF AUTHORITIES

PAGE

CASES

Adams v. State, 758 S.W.2d 709 (Ark.Ct.App. 1988) 10

Akins v. State, 596 S.E.2d 719 (Ga.Ct.App. 2004) 9

Borowicz v. North Dakota Department of Transportation, 529 N.W.2d 186 (N.D. 1995) 10

California v. Hodari D., 499 U.S. 621 (1991) 7

Ex Parte Betterton, 527 So.2d 747 (Ala. 1988) 10

Florida v. Bostick, 501 U.S. 429 (1991) 4, 6, 7, 11

Florida v. Rodriguez, 469 U.S. 1 (1984) 4, 7, 11

Florida v. Royer, 460 U.S. 491 (1983) 4, 6, 9, 11

I.N.S. v. Delgado, 466 U.S. 210 (1984) 4, 6, 7, 11, 12

Maine v. Patterson, 868 A.2d 188 (Me. 2005) 1, 3, 12

Medley v. State, 630 So.2d 163 (Ala.Crim.App. 1993) 9

Merideth v. State, 603 S.W.2d 872 (Tex.Cr.App. 1980) 10

Michigan v. Chesternut, 486 U.S. 567 (1988) 5, 13

People v. Clark, 541 N.E.2d 199 (Ill.App.Ct. 1989) 9

People v. Murray, 560 N.E.2d 309 (Ill. 1990) 9

Purce v. United States, 482 A.2d 772 (D.C. 1984) 9

State v. Boswell, 294 S.E.2d 287 (W.Va. 1982) 10

State v. Culbreath, 387 S.E.2d 255 (S.C. 1990) 9

State v. Knox, 939 P.2d 710 (Wash.Ct.App. 1997) 10

State v. Neyrey, 383 So.2d 1222 (La. 1979) 10

State v. O'Neill, 62 P.3d 489 (Wash. 2003) 10

TABLE OF AUTHORITIES

PAGE

State v. Zubizareta, 839 P.2d 1237 (Idaho 1992).....10

Terry v. Ohio, 392 U.S. 1 (1968) 1, 6, 12, 14

United States v. Barry, 394 F.3d 1070 (8th Cir. 2005).....10

United States v. Carroll, 591 F.2d 1132 (5th Cir. 1979).....10

United States v. Drayton, 536 U.S. 194 (2002) ...4, 6, 7, 9, 11

United States v. Mendenhall, 446 U.S. 544 (1980).....1, 6, 11, 12

OTHER AUTHORITIES

4 W. LaFave, Search and Seizure, § 9.4(a) (4th ed. 2004).....7, 8, 13

INTEREST OF AMICI CURIAE

Amici States' interest arises from the fact that this case implicates one of the most common types of police-citizen contact: consensual street encounters. In *Maine v. Patterson*, 868 A.2d 188 (Me. 2005), the Maine Law Court addressed such an encounter and determined that a police officer's simple request, without any show of authority, constitutes a seizure under the Fourth Amendment.[1] This decision demonstrates a need for clarity and guidance on the issue of when a police-citizen encounter that occurs in a public place involving pedestrians or persons in parked cars constitutes a Fourth Amendment seizure.

Amici States have a compelling interest in this case, both because the Maine Law Court's conclusion is contrary to this Court's decisions addressing the issue of when a seizure occurs, and because it is contrary to numerous decisions of other courts that have addressed similar facts to those presented here. *Maine v. Patterson* undermines the strong public policy in favor of legitimate police investigation, and erodes the concept this Court has recognized that the police may engage in actions that would otherwise be acceptable if performed by private citizens. *See United States v. Mendenhall*, 446 U.S. 544, 553 (1980); *Terry v. Ohio*, 392 U.S. 1, 32-33 (1968) (Harlan, J., concurring). The Maine Law Court's holding that a seizure occurs when a police officer approaches a parked vehicle and requests that the window be rolled down chills the right of

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[1] The judgment at issue in this case was rendered by the Maine Supreme Judicial Court sitting as the Law Court. To maintain consistency with the terms used by the Maine Attorney General in the Petition for a Writ of Certiorari to refer to this court, the term "Maine Law Court" will be used here as well.

the police to engage in lawful conduct, both in investigating crime and in ensuring the welfare and safety of citizens. Because this decision could be relied on by other states in reaching a similarly erroneous conclusion, because this decision significantly alters the reasonable police officer's perception of what conduct he or she may lawfully engage in, and because this decision is wrong, this Court should grant certiorari.

STATEMENT OF THE CASE AND FACTS

On January 31, 2004, just after midnight, Officer Nickerson with the University of Maine Police Department was on routine patrol when she spotted a car engaged in legal, yet suspicious, maneuvers, so she decided to follow it. After the car entered a parking lot on the University of Maine campus, Officer Nickerson asked Sergeant Norman to take over. Sergeant Norman was driving an unmarked police car, and at no point did he activate any of the car's emergency lights or spotlights. Sergeant Norman arrived at the parking lot, and saw the car, parked, with its engine running. The sergeant parked his patrol car about fifteen feet behind and observed the car for about five minutes. It was a very cold night, and as he watched, no one exited the car, and the windows began to steam up.

Sergeant Norman walked up to the driver's side of the car. Although he was in uniform, he did not have his weapon visible. When the sergeant reached the driver's side, he tapped on the window, as neither of the two occupants of the car appeared to have seen him. In a voice just loud enough to be heard over the engine, he asked "please roll down the window."

The driver, later identified as the Respondent Patterson, opened the door. At this point, Sergeant Norman

noticed a heavy odor of alcohol. Upon smelling the alcohol, the sergeant asked the Respondent to step out of the car, and he was thereafter arrested and charged with operating a vehicle under the influence.

The Respondent filed a motion to suppress all evidence obtained subsequent to the request. After a hearing, the District Court granted the motion to suppress. The District Court held that this was a Fourth Amendment seizure based on the following three factors: 1) the sergeant was in uniform; 2) the defendant had an expectation of privacy in his car; and 3) the sergeant rapped on the driver's side window and requested that the window be rolled down. The District Court concluded that "more probably than not, defendant perceived the Sergeant's acts and words as a command from a police officer and not as a request for a conversation."

The Petitioner filed an interlocutory appeal to the Maine Law Court, which affirmed the order granting the motion to suppress. *See Maine v. Patterson*, 868 A.2d 188 (Me. 2005).[2] The Maine Law Court recognized that the question centered on the applicable measure of what constituted a show of authority: "whether [the sergeant's] communication was sufficient to effect a seizure depends

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[2] The Maine Law Court indicated that as an appellate court, it would decline to "review a cold transcript and draw our own factual inferences about the tone of voice, volume, and circumstances of Sgt. Norman's statement." However, the District Court, in finding a seizure and granting the motion to suppress, did not rely at all on the sergeant's "tone of voice" or the "volume" of his statement. The District Court simply based its ruling on the objective facts that the sergeant rapped on the window and "requested" that the window be rolled down.

upon whether it was a police request, or a command," and later noted that "[t]his is an admittedly close case." The Maine Law Court also recognized that "other courts confronting similar facts have come to differing conclusions."

REASONS FOR GRANTING THE WRIT

This Court should grant the petition because courts and law enforcement officers need guidance in the area of police-citizen street encounters, with regard to what constitutes a seizure under the Fourth Amendment. The question frequently turns on whether there is a show of authority, and the determination is often based on whether the officer made a request or a command. Indeed, this case provides a perfect example of why guidance is needed. A simple request to roll down a window during a police-citizen street encounter, without more, now constitutes a Fourth Amendment seizure in Maine, but such a request will not likely constitute a seizure in most other states, or where a federal offense is involved. This disparity is not only difficult for law enforcement officers, who must deal with this issue on a frequent basis, but it is potentially damaging to Fourth Amendment law across this country.

This Court should also grant the petition, not only to resolve the conflict between the Maine Law Court's decision and the decisions of numerous other courts where similar facts yielded a conclusion that no seizure occurred, but also the conflict between it and this Court's decisions in *Royer*, *I.N.S.*, *Bostick*, *Rodriguez*, and *Drayton*.[3] Consistency is

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[3] *United States v. Drayton*, 536 U.S. 194 (2002); *Florida v. Bostick*, 501 U.S. 429 (1991); *Florida v. Rodriguez*, 469 U.S. 1 (1984); *I.N.S. v. Delgado*, 466 U.S. 210 (1984); *Florida v. Royer*, 460 U.S. 491 (1983).

important in the area of Fourth Amendment law, as it guides the future actions of courts and law enforcement officers nationwide, and serves to protect the rights of citizens *and* the legitimate function of law enforcement. This Court should provide this consistency by granting the petition and reversing the Maine Law Court's decision.

I. There Is A Need For Guidance In The Area Of When A Seizure Occurs In The Context Of Street Encounters, Particularly In Light Of The Maine Law Court's Decision, Which Is In Direct Conflict With Decisions Of Other States And Circuits, And This Court's Own Decisions.

The Maine decision highlights the need for guidance from this Court in the area of police-citizen street encounters. Maine construed the reach of the Fourth Amendment in an unduly expansive manner, holding that a knock on a car window accompanied by a request to roll down the window constituted a seizure. Decisions from other federal and state courts considering a "show of authority" by an officer have reached different results. While this Court has provided general standards for what constitutes a seizure, these cases demonstrate that further articulation of the appropriate considerations for what constitutes a "show of authority" is needed.

This Court has held that the test for deciding whether an encounter constitutes a "seizure" for Fourth Amendment purposes is whether a reasonable person under the circumstances would have believed he or she was free to leave. *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988). When a person is in a place where he or she cannot leave or desires not to leave, this Court has articulated the test as follows: "[s]o long as a reasonable person would feel free to

'disregard the police and go about his business,' the encounter is consensual and no reasonable suspicion is required." *Bostick*, 501 U.S. at 434. Thus, the appropriate inquiry for all settings is whether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter. *Bostick*, 501 U.S. at 436; *Drayton*, 536 U.S. at 201.

However, "not all personal intercourse between policeman and citizens involve 'seizures' of persons." *Terry*, 392 U.S. at 19 n16. Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual in a public place and asking him or her questions. Instead, it is only when the officer restrains a citizen through physical force or a show of authority that a seizure has occurred. *I.N.S.*, 466 U.S. at 215; *Mendenhall*, 446 U.S. at 552. Circumstances that might indicate a seizure include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554. This last circumstance was the focus of the Maine Law Court's determination, and it is an area that needs further clarification by this Court.

This Court has addressed guidelines for what constitutes a seizure in a few discrete contexts: in airports, on buses, and in workplaces. In *Royer*, this Court held that asking for and examining Royer's airline ticket were permissible, but when the officers told Royer that he was suspected of transporting narcotics and asked him to accompany them to the police room, while retaining his ticket and driver's license, Royer was effectively seized at that point. *Royer*, 460 U.S. 491. This analysis indicates that a simple request, without more, does not constitute a seizure.

See also I.N.S., 466 U.S. at 216 (simple request for identification not a seizure); *Bostick*, 501 U.S. at 434,437 (request to examine identification or for consent to search luggage not a seizure; "no seizure occurs when police ask questions of an individual ... so long as the officers do not convey a message that compliance with their requests is required."); *Rodriguez*, 469 U.S. at 5-6 (initial contact where officers simply asked if defendant would step aside and talk with them was a consensual encounter); *Drayton*, 536 U.S. at 203-204 (request for consent to search luggage is not a seizure).

However, this Court has not yet applied or developed the analysis in the context of street encounters. As the instant case pointedly demonstrates, clarification of this test in the context of street encounters is necessary. What often arises in this context is an issue of whether the officer engaged in a show of authority, and the lower courts and members of law enforcement need further guidance from this Court on this point.

This Court has previously recognized that the general test for what constitutes a "show of authority" is an objective one, addressing "not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person. *California v. Hodari D.*, 499 U.S. 621, 628 (1991). "The critical factor is whether the policeman, even if making inquiries a private citizen would not, has otherwise conducted himself in a manner which would be perceived as a nonoffensive contact if it occurred between two ordinary citizens." 4 W. LaFave, *Search and Seizure*, § 9.4(a) at 425-426 (4th ed. 2004). LaFave suggests that there is no seizure if the officer "'did not order the defendant' to do something or 'demand that he' do it...". *Id.*, at 426.

Specifically, with regard to contact with persons in parked cars, LaFave observes:

> [T]he mere approach and questioning of [persons seated within parked vehicles] does not constitute a seizure. The result is not otherwise when the officer utilizes some generally accepted means of gaining the attention of the vehicle occupant or encouraging him to eliminate any barrier to conversation. The officer may tap on the window and perhaps even open the door if the occupant is asleep. A request that the suspect open the door or roll down the window would seem equally permissible, but the same would not be true of an order that he do so.

4 W. LaFave, *Search and Seizure*, § 9.4(a), at 433 (4th ed. 2004).

By holding that a request to roll down a window constitutes a seizure, the Maine Law Court has imposed an unreasonable restriction on when a law enforcement officer may contact a person in a parked car without reasonable suspicion that he or she has engaged in criminal activity. As indicated above, the sergeant simply knocked on the window and requested that the driver roll the window down. There was no other factor present that could be properly considered

a "show of authority."[4]

The Maine Law Court's resolution of this issue is directly contradictory to the conclusion reached by many courts in this country: that knocking on a window of a parked car and asking or requesting that the occupant roll the window down or exit the car is not a seizure. *See e.g.*, *Purce v. United States*, 482 A.2d 772, 777 (D.C. 1984) (no seizure where officer approached car parked in lot, tapped on window, and asked driver to roll down the window); *Medley v. State*, 630 So.2d 163, 165 (Ala.Crim.App. 1993) (no probable cause or reasonable suspicion required where officer approached parked car, tapped on window, and requested that the driver roll down the window); *Akins v. State*, 596 S.E.2d 719, 721 (Ga.Ct.App. 2004) (no seizure where officer approached passenger side of parked car and asked passenger to roll down her window); *People v. Murray*, 560 N.E.2d 309, 314 (Ill. 1990) (no seizure where two officers approached car parked on side of road, one officer knocked on window and asked defendant to step out of the car); *People v. Clark*, 541 N.E.2d 199, 203 (Ill.App.Ct. 1989) (no seizure where car was parked in gas station lot and officer approached driver, knocked on window and indicated to the driver to roll down window); *State v. Culbreath*, 387 S.E.2d 255, 257 (S.C. 1990), *abrogated on other grounds by Horton v. California,* 496 U.S. 128 (1990) (no seizure where officer tapped on window of parked car and motioned for driver to roll down window);

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[4] Contrary to the District Court's ruling in this case, the fact that the officer was wearing a uniform does not constitute or contribute to a conclusion that there was a show of authority. *See Drayton*, 536 U.S. at 205; *Royer*, 460 U.S. at 497 (the fact that an officer identifies himself as a police officer, whether it be by the wearing of a uniform or the display of a badge, does not convert the encounter into a seizure).

State v. O'Neill, 62 P.3d 489, 497-498 (Wash. 2003) (where officer turned spotlight on parked car to see license plate, then approached car with flashlight directed at the driver's face and asked the driver to roll down window, no seizure); *State v. Knox*, 939 P.2d 710, 714-715 (Wash.Ct.App. 1997), *overruled on other grounds by State v. O'Neill*, 62 P.3d 489 (Wash. 2003) (no seizure where officer motioned for driver of car parked on ferry to roll down the window).[5]

However, at least two jurisdictions have held, as Maine has, that a knock on a window accompanied by a request to roll down the window or open the door, constitutes a seizure. *See United States v. Carroll*, 591 F.2d 1132, 1135 (5th Cir. 1979) (stop occurred where officers approached parked car, tapped on the window, and subsequently questioned the occupant); *Borowicz v. North Dakota Department of Transportation*, 529 N.W.2d 186, 188 (N.D. 1995) (implying seizure occurred where officer approached

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[5] Many courts have also held that approaching a parked car and simply knocking on the window to gain the occupant's attention is not a seizure. *See e.g.*, *United States v. Barry*, 394 F.3d 1070, 1075 (8th Cir. 2005); *Ex Parte Betterton*, 527 So.2d 747, 750 (Ala. 1988); *Adams v. State*, 758 S.W.2d 709, 712 (Ark.Ct.App. 1988); *State v. Zubizareta*, 839 P.2d 1237, 1241 (Idaho 1992); *Merideth v. State*, 603 S.W.2d 872, 873 (Tex.Cr.App. 1980); *State v. Boswell*, 294 S.E.2d 287, 294-295 (W.Va. 1982); *see also State v. Neyrey*, 383 So.2d 1222, 1224 (La. 1979) (no seizure where officer approached parked car, knocked on window, and after occupant failed to respond as he was either asleep or unconscious, officer opened door and shook occupant awake). There is no rational basis to distinguish a simple knocking from a knocking accompanied by a request to roll down the window: a reasonable inference from the knocking alone is that the officer desires to speak with the occupant.

parked car, knocked on window, and requested that occupant open door).

There is simply no rational distinction to explain how circumstances such as those in the vast majority of the cases cited above are not seizures, but a request to roll down a window, as decided by the Maine Law Court, is a Fourth Amendment seizure. Indeed, the sergeant here prefaced his request with the word "please." It is hard to imagine a word more closely associated with the concept of a request than the word "please."

The Maine Law Court's decision is also contrary to the pronouncements made by this Court in *Royer*, *I.N.S.*, *Bostick*, *Rodriguez*, and *Drayton*. This Court has held that, in general, an officer is entitled to address a citizen and pose questions to that person. *Mendenhall*, 446 U.S at 553. As indicated above, in several cases but in other contexts, this Court has held that a request, without more, does not constitute a seizure under the Fourth Amendment. Because a request, without more, is exactly what occurred in the instant case, the Maine Law Court decided this case contrary to this Court's decisions in *Royer*, *I.N.S.*, *Bostick*, *Rodriguez*, and *Drayton*.[6]

Although the state and federal circuit cases cited above demonstrate that most courts have properly followed this Court's general pronouncements and found no seizure under similar facts as those presented here, at least three courts have now reached a contrary conclusion upon

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[6] Again, the District Court and Maine Law Court did not rely on any aspect of the request to roll down the window other than the objective fact of the request itself. The District Court did not rely on the officer's tone or volume of voice in any manner.

essentially the same facts. As indicated above, consistency is important in the area of Fourth Amendment law, particularly because it provides the most important source of guidance for law enforcement. Because this Court has not addressed the concept of a seizure in the context of a street encounter such as that presented here, inconsistency in opinions from the lower courts has occurred, and may continue. This Court should address this area of the law, reaffirm that a request alone does not constitute a seizure, and provide guidelines to ensure that no additional courts reach contradictory and similarly erroneous conclusions as the one reached in *Maine v. Patterson*.

The need for guidance and consistency is not only important for the effective and appropriate resolution of criminal cases, it is vitally important to law enforcement as well. The purpose of the Fourth Amendment is not to eliminate all contact between the police and private citizens, but to prevent "arbitrary and oppressive interference" by the police. *I.N.S.*, 466 U.S. at 215; *Mendenhall*, 446 U.S. at 553. This Court has often recognized the need for protection of legitimate law enforcement practices, and has declined to create unnecessary restrictions on the police that do not further the purposes of the Fourth Amendment. *Mendenhall*, 446 U.S. at 554 (recognizing the need for police questioning as a tool in the effective enforcement of the criminal laws). Indeed, this Court noted that "[w]ithout such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished." *Mendenhall*, 446 U.S. at 554.

And, in addition to law enforcement-related purposes, the police often contact citizens for reasons wholly unrelated to a desire to prosecute that person for a crime. *Terry*, 392 U.S. at 13. For example, the police may need to

contact a person to determine whether that person needs medical or other assistance. The police may also need to contact persons to determine if they witnessed some other crime. Undoubtedly, there are many more instances where the police may legitimately desire to contact an individual on the street for reasons other than investigating that person for criminal conduct. There can be no real question that police-citizen street encounters serve many useful and lawful purposes.

"[A]ny test intended to determine what street encounters are not seizures must be expressed in terms that can be understood and applied by the officer." 4 W. LaFave, *Search and Seizure*, § 9.4(a) at 414 (4th ed. 2004); *see also Chesternut*, 486 U.S. at 574 (use of objective standard when determining whether seizure occurred "allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment."). The Maine Law Court's conclusion demonstrates that there is a certain amount of confusion in the area of what constitutes a command and, consequently, a seizure. For law enforcement officers in Maine and a few other jurisdictions, the guidelines as to what constitutes a seizure are significantly more restrictive than the standards in most other states. And, it appears as if officers in Maine can now almost never contact persons in parked cars, unless they remain completely silent and wait for the individual to speak first - a restriction particularly unreasonable in situations involving caretaking or welfare checks where the person inside the car may be unaware of the officer's presence and in need of swift assistance. This cannot be the standard for proper police conduct.

As indicated above, this Court has recognized the need for legitimate police contact with private citizens, and the Maine Law Court's decision threatens that lawful

practice. And, because the Maine Law Court's decision is contrary to the significant weight of caselaw across this country, and is fundamentally flawed in that it does not apply the proper standards set forth by this Court, this Court should grant certiorari to not only give guidance to other courts addressing this issue in the future, but also to provide law enforcement officers with some direction as to when they may contact citizens when they have insufficient information to conduct a *Terry* investigative detention.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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